STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED August 23, 2007
v	No. 270381 Shiawassee Circuit Court
SACKDAVANH NOY PHRAXAYAVONG, Defendant-Appellant/Cross-Appellee.	LC No. 05-003008-FH

Before: Owens, P.J., and White and Murray, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2), and assault and battery, MCL 750.81. The trial court sentenced him to 40 months' probation, with the first 12 months to be served in jail, for the home invasion conviction, and to 93 days in jail for the assault and battery conviction. He appeals as of right. Plaintiff cross-appeals, challenging defendant's sentence for the home invasion conviction. We affirm defendant's convictions but remand for resentencing.

Defendant's convictions arise from an incident that occurred on the night of July 17-18, 2005, when defendant entered the home of Tammy and Ryan Osborn and assaulted Daniel Haljean. Defendant's girlfriend, Lisa Humphrey, had told defendant that Ryan and Haljean had sexually assaulted her on various occasions, and defendant apparently went to the Osborn household to confront Ryan and Haljean regarding her allegations. Seven or eight other men also entered the home, ostensibly to provide support and assistance to defendant. Ryan and Tammy Osborn attempted to defend Haljean, but they were unsuccessful. Defendant punched Haljean several times. Tammy's brother, Louis Andy Zilla, and his fiancée, Carrie Miller, were also in the home at the time and witnessed the events in question. Miller called the police, who came to the house and arrested defendant. Haljean received cuts, bruises, and a black eye in the fight. No other occupants of the home were injured.

I. Hearsay

Defendant argues on appeal that the trial court erred by admitting several hearsay statements into evidence. We disagree. We review the trial court's decision to admit evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). A trial

court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *People v McLaughlin*, 258 Mich App 635, 651; 672 NW2d 860 (2003). Hearsay is not admissible except as provided by the rules of evidence. MRE 802; *McLaughlin*, *supra*.

First, defendant argues that Zilla's testimony regarding a verbal exchange between defendant and Haljean constituted impermissible hearsay. Zilla testified that Haljean asked defendant, "Do you want to talk about this," when defendant confronted him inside the Osborn residence. However, the trial court did not admit this testimony to prove the truth of the matter asserted (to show that Haljean wanted to talk about the matter), but to present what Zilla heard and saw during the encounter (that when defendant confronted Haljean regarding Humphrey's allegations, Haljean asked defendant if he wanted to talk about the allegations). Further, this evidence, offered for a non-hearsay purpose, is relevant because it supports the prosecution's claim that defendant assaulted Haljean and contradicts defendant's claim that Haljean was acting in an aggressive manner and that defendant fought him in self-defense. See MRE 402.

Zilla also testified that when defendant asked Haljean about the rifle he was holding, Haljean replied with the statement, "This is all I need." Defendant argues that this statement constitutes impermissible hearsay. Again, however, this statement was not offered for its truth, but rather to explain the series of events relating to the home invasion and assault charges, including Haljean's reactions to defendant's conduct. The trial court did not err when it admitted Zilla's testimony for this purpose.

Defendant also argues that Miller's testimony that Zilla, after opening the front door and talking with defendant, told defendant to wait while he contacted Ryan constitutes impermissible hearsay. Again, this statement was not offered for its truth (to indicate that defendant waited at the door and that Zilla went to wake Ryan). Instead, this statement was offered for a non-hearsay purpose, namely, to show that he was not given permission to enter the Osborn residence. In turn, evidence indicating that defendant was not invited in the Osborn residence is relevant to establish an element of the home invasion charge.[1] The absence of permission was established by the fact that Zilla made the statement, independently of the factual content of the statement. Accordingly, the trial court did not err when it admitted this statement for a non-hearsay purpose.

[1] To establish that defendant committed first-degree home invasion, the prosecution must establish, among other elements, that defendant entered the dwelling without permission. MCL 750.110a(2). "'Without permission' means without having obtained permission to enter from the owner or lessee of the dwelling or from any other person lawfully in possession or control of the dwelling." MCL 750.110a(1)(c).

Further, defendant challenges the admissibility of a statement made by Tammy Osborn at trial. Tammy testified that on the night of the home invasion, Humphrey made the following comments to her: "[Defendant] was very angry at [Haljean] and [Ryan], that she had been trying for months to stop him from responding to his anger, and that he was on his way to [the Osborn residence] to take care of business." However, the trial court admitted this testimony for a proper non-hearsay purpose, namely, to explain the subsequent conduct of the residents of the Osborns' house. Accordingly, the admission of this testimony was not erroneous.

Finally, defendant claims that the trial court erroneously permitted Shawn Hanycz, an officer with the City of Perry Police Department who responded to the scene, to testify that Humphrey denied that either Ryan or Haljean raped her when he asked her about these allegations. However, the trial court did not admit this statement to prove or disprove that Ryan or Haljean sexually assaulted Humphrey. Instead, the trial court properly admitted this testimony for a non-hearsay purpose, namely, to explain why Hanycz neither questioned Ryan and Haljean regarding Humphrey's allegations nor otherwise investigated her claims. Further, Hanycz's testimony is relevant to refute Humphrey's testimony that Ryan and Haljean sexually assaulted her.

II. Prosecutorial Misconduct

Defendant argues that the prosecutor committed misconduct by referring to the foregoing testimony in his closing and rebuttal arguments. We disagree. Because defendant did not challenge the prosecutor's remarks at trial, our review of this issue is limited to plain error affecting defendant's substantial rights. *McLaughlin*, *supra* at 645. Because the testimony was properly admitted, the prosecutor's reference to the testimony was not plain error.

III. OV 9

On cross appeal, the prosecutor argues that the trial court erred when it scored zero points for offense variable (OV) 9 of the sentencing guidelines. We agree. "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *McLaughlin*, *supra* at 671. A trial court's scoring decision will be upheld if there is any evidence in the record to support it. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

MCL 777.39(1) provides that ten points should be scored for OV 9 if there were two to nine victims, and zero points should be scored if there were fewer than two victims. The sentencing court must count "each person who was placed in danger of injury or loss of life as a victim." MCL 777.39(2)(a); *People v Morson*, 471 Mich 248, 262; 685 NW2d 203 (2004).

The trial court determined that only Haljean was a victim for purposes of scoring OV 9 because the evidence showed that defendant only targeted him and did not exhibit assaultive conduct toward any other person in the home. Although there is support in the record for the trial court's factual finding that only Haljean was targeted and that defendant did not intend to harm anyone else, the proper inquiry under OV 9 is whether other persons were placed in danger of injury during the incident. The trial court erred by failing to consider the evidence in this context.

According to the evidence presented at trial, defendant, aided by seven or eight other persons, invaded the Osborns' home to assault Haljean. The evidence showed that Ryan and Tammy Osborn tried to make the intruders leave their home, that Ryan Osborn tried to pull defendant off Haljean, and that Tammy Osborn tried to block the door to Haljean's room. When it addressed the scoring of OV 9, the trial court specifically found that other persons were present in the house when defendant and his compatriots invaded it, and that Tammy and Ryan were in proximity to defendant when he was attacking Haljean. Properly applied, these findings establish that Haljean and at least two others were placed in danger of injury. Accordingly, there were at least three victims for purposes of scoring OV 9. Therefore, the trial court should have scored ten points for this offense variable. Because the scoring error affects defendant's sentencing guidelines range, we vacate defendant's home invasion sentence and remand for resentencing. *People v Fransisco*, 474 Mich 82, 91-92; 711 NW2d 44 (2006).

Defendant's convictions are affirmed and the case is remanded for resentencing. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Christopher M. Murray